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No. 80-2103

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT Q. WHITWELL,
Petitioner,

v.

BOARD OF LAW EXAMINERS OF TENNESSEE, JAY GUY BEATTY, JR., HENRY HALL WALLER, JR., and ROBERT L. GREEN, Individually and in their official capacities,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents are dissatisfied with the petitioner's presentation of the questions involved and therefore present the sole question as follows:

1. Did the petitioner's claim of a present right to admission to the Bar of Tennessee create an Article III controversy over which the district court lacked subject matter jurisdiction?

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STATEMENT OF THE CASE

Petitioner, Robert Q. Whitwell, seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 18, 1981. That decision affirmed the dismissal of petitoner's complaint as ordered by the United States District Court for the Western District of Tennessee, the Honorable Robert M. McRae, Jr., Judge, on July 11, 1979.

Petitioner is a resident and licensed practicing attorney in the State of Mississippi. On September 22, 1978, he filed a complaint for damages and for equitable relief in the United States

District Court for the Western District of Tennessee, Western Division, against the Board of Law Examiners of Tennessee and the individual members of that Board as a result of an alleged unconstitutional denial of a certificate that petitioner was eligible for a license to practice law in the State of Tennessee. In his complaint, petitioner alleged that he was a resident of Southaven, DeSoto County, Mississippi, and was a licensed practicing attorney in the State of Mississippi, having been so licensed for more than five (5) years. He maintained law offices in Southaven, which he alleged was an area contiguous to the State of Tennessee and customarily considered a residential adjunct or suburb of the State of Tennessee. Petitioner alleged in his complaint that on or about June 10, 1977, he applied to the Board of Law Examiners for a certificate and for admission to practice law in Tennessee by reciprocity pursuant to TENN. CODE ANN. § 29-101 *et seq.* and Rules 26 and 37 of the Tennessee Supreme Court. He alleged that although he met the basic requirements for the practice of law in Tennessee, the Board of Law Examiners wrongfully denied him a certificate for admission to practice in Tennessee because he did not intend to engage in the practice of law in Tennessee on a full-time basis or perform the majority of his practice in the State of Tennessee.

Following this denial, petitioner requested a hearing before the Board of Law Examiners and exchanged correspondence with the Board concerning the nature and scope of that hearing. Before a hearing could be had, however, the Supreme Court of Tennessee on January 25, 1978, amended its Rule 36 so as to exclude from the Tennessee Bar non-resident attorneys. After that amendment, the hearing was not held and on September 22, 1978, the instant complaint was filed.

On October 16, 1978, the respondents filed a motion to dismiss the action upon the grounds that the district court lacked jurisdiction over the subject matter of the complaint and that the complaint failed to state a claim upon which relief could be granted. In support of that motion, respondents asserted that

the petitioner complained of the application of certain Bar admission requirements to him and stressed that the application of Bar admission requirements to a particular individual can be reviewed only by the United States Supreme Court on certiorari to a State Supreme Court. Respondents further asserted that the actions of the Board of Law Examiners in certifying applicants for licenses to practice law in Tennessee were subject to direct review by the Tennessee Supreme Court pursuant to Rule 37 of that Court.

In a memorandum opinion entered on July 11, 1979, the district court determined that because the petitioner claims his present right to admission to the Tennessee Bar has been denied, an Article III controversy exists and the district court lacks jurisdiction over the subject matter. The district judge ruled that the Supreme Court of Tennessee is the proper form for the petitioner. The respondents' motion to dismiss for lack of subject matter jurisdiction therefore was granted by the court, and on July 12, 1979 an order was entered dismissing the cause.

Petitioner took an appeal to the United States Court of Appeals for the Sixth Circuit, which court affirmed the decision of the district court in an order issued on March 13, 1981. The court held that under established precedent actions alleging denial of an individual's constitutional rights concerning his request for admission to the Bar of a state, based upon the matter in which a state authority has applied its laws and regulations, is not appealable to the federal district courts. Petitioner then brought the instant proceeding before this Honorable Court.

REASONS FOR DENYING THE WRIT

I.

The Issues Presented By This Case Are Not Sufficiently Special Or Important To Warrant Review By This Court.

The petition for certiorari filed in this cause fails to establish the propriety of review by this Court. Rule 17 of the Supreme Court Rules states that certiorari will be granted only where special or important reasons for doing so exist and outlines examples of such reasons. The petition has not set forth any of the reasons for granting certiorari enumerated in Rule 17 nor any other reasons. Instead, the petition is no more than an appellate brief which reargues the merits of the case as it was presented to the Sixth Circuit. The decisions of law rendered in this cause are not in conflict with decisions of other courts, but instead apply the settled principles of law developed by the federal appellate courts. Nor are the specific circumstances of this case so special or important as to warrant the attention of the highest court of the land. Since the petition demonstrates no basis for a grant of certiorari under Rule 17, the petitioner has failed to indicate his entitlement to the writ.

II.

The Decisions Below Gave Full Consideration To The Issues Presented And Decided Them Correctly.

Both the district court and the United States Court of Appeals for the Sixth Circuit have carefully considered the issues presented in this cause and correctly decided them. Both decisions rely upon and are in accordance with the settled rule developed by a long string of federal appellate cases and approved by dicta of this Court as recently as **Leis** v. **Flynt**, 439 U.S. 438, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979). The petition for certiorari demonstrates no reasons why the opinions are inadequate; indeed, it fails to meet directly or distinguish their compelling ra-

tional and merely restates the arguments made before the Sixth Circuit. Because there are no reasons indicating that the decisions below are inadequate in any respect, the petition for certiorari should be denied.

III.

A Federal District Court Lacks Jurisdiction Over The Subject Matter Of A Complaint In Which An Applicant For Admission To The Bar Of A State Claims A Denial Of A Present Right To Be Admitted.

It has long been settled that matters of the admission, regulation, and discipline of attorneys are subject to state regulation, particularly to regulation by the highest state court. **E.g. Lathrop** v. **Donohue,** 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961) (regulation); **Theard** v. **United States,** 254 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1967) (discipline); **Doe** v. **Pringle,** 550 F.2d 596 (10th Cir. 1976) (admission); **Chaney** v. **State Bar of California,** 386 F.2d 962 (9th Cir. 1967) (admission). The admission of attorneys to the practice of law in Tennessee has also been recognized by the Tennessee Supreme Court as a judicial function and an exercise of judicial power. The respondent Board of Law Examiners is an agency created as an aid to the judiciary in the licensing of attorneys and is a part of the judicial branch of state government. **Belmont** v. **Board of Law Examiners,** 511 S.W.2d 461 (Tenn. 1974); TENN. CODE ANN. § 29-101.

In regulating admission to the practice of law in Tennessee, the Tennessee Supreme Court as the licensing authority has promulgated and administered certain rules. Among these are Rules 36 and 37, pertinent parts of which have been reproduced in the petition for writ of certiorari at 3 to 7. Concerning admission by reciprocity, section 8 of Rule 37 permits admission without examination of an applicant upon a license from another state upon conditions no less favorable than those imposed by that

state for the admission of lawyers licensed in Tennessee. With respect to applicants licensed in Mississippi, Tennessee has imposed a two-year residency requirement for admission by reciprocity since such a requirement exists in Mississippi for Tennessee lawyers. **See Knowlton v. Board of Law Examiners,** 513 S.W.2d 788 (Tenn. 1974). Under section 16 of Rule 37, however, a person residing outside of Tennessee but within an area closely contiguous to the boundaries of Tennessee which is regarded as a residential suburb of the State may, in the discretion of the Board of Law Examiners, be deemed to satisfy Tennessee residency requirements. The Supreme Court has further stated that "citizens of this and other states who do not intend to practice their profession regularly in the courts of this state will not be admitted."

Petitioner has made clear throughout this proceeding that he does not challenge the validity of the provisions of any of the rules governing admission to practice in Tennessee. He emphasizes at page 13 of his petition, as he did at page 3 of his brief before the Sixth Circuit, that "he does not challenge in any wise, the authority of the judicial branch of state government to promulgate pertinent rules, nor the constitutionality or propriority of such rules, nor the form or avenue of appeal to the challenge of their validity." Instead, petitioner has challenged the denial of his particular application which he contended satisfied the provisions of the applicable rules. The complainant thus has alleged the denial of a present right to admission to the Bar of Tennessee. It is well-settled that there is a fundamental difference between a claim that a state has unlawfully denied a particular applicant admission to the Bar and a claim that the rules and regulations generally governing admission to the Bar are unconstitutional. **See Delgado v. McTighe,** 442 F. Supp. 725 (E.D. Pa. 1977). In the former situation, the claim alleges a denial of a present right which creates an Article III controversy, while in the latter situation the claim challenges general provisions which preclude a present right. When applicant raises an Article III controversy by challenging the denial of his par-

ticular application for admission to the Bar, a federal district court cannot entertain the suit, since such court does not sit as a court of appeals on such matters. Rather, the applicant is entitled to review through the state court system and ultimately by certiorari in the United States Supreme Court. See **Ktsanes** v. **Underwood**, 552 F.2d 740 (7th Cir. 1977); **Doe** v. **Pringle**, 550 F.2d 596 (10th Cir. 1976); **Feldman** v. **State Board of Law Examiners**, 438 F.2d 699 (8th Cir. 1971); **Arvello** v. **Supreme Court of Puerto Rico**, 382 F. Supp. 510 (D.P.R. 1974). The federal district courts have jurisdiction only where the constitutional validity of rules laying down general conditions for admission to the Bar is challenged. **See Ktsanes** v. **Underwood**, 552 F.2d 740 (7th Cir. 1977). Here it is clear that the gravamen of petitioner's complaint is that he has been denied his individual right to immediate admission to the Tennessee Bar. That denial has created an Article III controversy reviewable only in the State Supreme Court and, by certiorari, in the United States Supreme Court. **See In re Summers**, 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 1795 (1945). Consequently, this is not the sort of case which federal courts can maintain, since their jurisdiction is limited to attacks on the constitutional validity of general rules laying down conditions for admission to the Bar. **See Delgado** v. **McTighe**, 442 F. Supp. 725, 731 (E.D. Pa. 1977). Because the instant case qualifies clearly as an Article III controversy, the federal district court directly dismissed the complaint.

Petitioner places great stress upon the fact that his suit is grounded on 42 U.S.C. § 1983 as a claim under the federal Civil Rights Act and that he has alleged violation of his federal constitutional rights. Petitoner's characterization of his suit as a civil rights action does not alter the otherwise applicable rule that his relief is in the state court system, and not in the federal system. Exactly this contention was made in **Doe** v. **Pringle**, 550 F.2d 596 (10th Cir. 1976). There the court held that a federal district court lacks subject matter jurisdiction to review the denial of a particular application for admission to the Bar, even though the challenge was anchored to alleged deprivations of

federally protected due process and equal protection rights. The court characterized Doe's effort as an attempt to seek review of the state proceedings in the inferior federal courts when the proper remedy was to appeal to the state Supreme Court and seek review in the United States Supreme Court. The court explicitly stated:

> Doe cannot invoke the provisions of section 1983 of the Civil Rights Act in federal district court so as to circumvent and avoid his obligation to seek direct review in the United States Supreme Court.

550 F.2d at 599. By invoking section 1983, the petitioner is trying to do indirectly what he cannot do directly, and thereby receive a hearing in the federal district court without exhausting his state-accorded remedies. It is clear that the federal courts do not allow such efforts to succeed and that petitioner's claim of federal jurisdiction over his cause is not strengthened by the invocation of section 1983.

The Supreme Court of Tennessee is the proper form for the petitioner's claim. Petitioner now asserts that he omitted to pursue this course of review because the respondent Board had denied him the hearing which was a requisite to seeking relief in the Tennessee Supreme Court. Such however is clearly not the case. The record reveals that the Board was disposed to grant petitioner's hearing and would have done so had he pursued his claim after the amendment of the Supreme Court rules. Moreover, the petition at page 12 misreads section 15.01 of Supreme Court Rule 37. That rule does not state that a hearing before the Board is a necessary prerequisite to review by the State Supreme Court. The rule states that the court will not entertain applications for modification of that rule itself or for its construction, but the rule does not imply that the court will close its ears to those who are denied a hearing before the Board. Had the Board denied petitioner a hearing, he could have protested and appealed that denial to the Supreme Court

itself or sought an order from the Supreme Court that the Board grant him a hearing. Petitioner had available to him the writs of certiorari and mandamus by which the Supreme Court could have directed the respondent Board to accord petitioner his full constitutional rights. Instead, however, petitioner ignored his remedies under state law and sought to resort to the federal district court for just the sort of appellate review which the cases have prohibited. Even had the Tennessee Supreme Court improperly denied or infringed petitioner's constitutional rights, his remedy would have been to seek review of that action directly by the United States Supreme Court, and not to institute this cause in the federal district courts. Thus it is clear that petitioner has failed to utilize the procedures allowed him under state law and that he may not resort to the federal district court for his remedy. **See Grossgold v. Supreme Court of Illinois**, 557 F.2d 122, 125 (7th Cir. 1977).

In its memorandum opinion, the Sixth Circuit relied upon the decisions in **Ktsanes** and **Doe v. Pringle**. The court noted that petitioner has not challenged the constitutionality of a particular law or rule but instead attacks the manner in which state rules were applied to his particular Bar application. The court concurred in the overwhelming case authority that an individual's claim of infringement of his constitutional rights in the denial by state authorities of his admission to the Bar is not appealable to the federal district courts, but instead creates an Article III controversy which the State Supreme Court and United States Supreme Court may review. The respondents submit that the Sixth Circuit opinion correctly states the law and raises no issues which are worthy of special review in their current posture by the United States Supreme Court. Since the Sixth Circuit has correctly decided the issues before it, and since the petition for writ of certiorari does not seriously draw into question the rationale of that court, this Honorable Court should not grant a further review in the case.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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